United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-2137
76-2139
76-2140

To be argued by
ETHAN LEVIN-EPSTEIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 76-2137, 76-2139, and 76-2140

UNITED STATES OF AMERICA, *Appellee,*

—against—

PAUL FLAMMIA, *Appellant.*

UNITED STATES OF AMERICA, *Appellee,*

—against—

CHARLES PETERS, *Appellant.*

UNITED STATES OF AMERICA, *Appellee,*

—against—

GERALD COLLINS, *Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Appellants Paul Flammia, Charles Peters and Gerald Collins appeal from a ruling of the United States District Court for the Eastern District of New York (Hon. Thomas C. Platt, *J.*) on October 8, 1976, which ruling denied appellants' identical motions, pursuant to T. 28 U.S.C.

§ 2255, for leave to file untimely notices of appeal from judgments of conviction entered against them on November 24, 1975.[1]

The sole issue to be decided on appeal is whether the district court committed reversible error in concluding that the failure of appellants to file notices of appeal from their judgments of conviction was not the result of ineffective assistance of counsel.

Statement of Facts

This case comes to the Court in an unusual procedural posture. Appellants each pleaded guilty to one count of an indictment charging them with possessing, and using a firearm during the commission of a felony in violation of T. 18 U.S.C. § 924(c)(1)(2). On November 21, 1975, they were sentenced. Appellant Flammia was given a sentence of six years imprisonment, while Peters and Collins each received eight year terms. All three sentences were to be served consecutively to sentences each of the appellants was then serving with the State of New York. Neither Collins, Peters nor Flammia filed a notice of appeal from his judgment of conviction (appellant Collins' Appendix, 7).

More than three months after they were sentenced, appellants filed identical *pro se* 2255 motions in the district court seeking "the right to appeal the sentencing and/or sentence out of time, in lieu of timely notice accordingly." (see, for example, appellant Collins' Appen-

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[1] Although the Government's motion to consolidate the appeals in Docket Nos. 76-2137 (Flammia), 76-2139 (Peters) and 76-2140 (Collins) was denied per Order of Hon. William A. Timbers, U.S.C.J., dated November 9, 1976, pursuant to Judge Timbers' order, one brief is being submitted by the United States in response to all three appeals.

dix, 5). In support of their motions, appellants contended that they had been denied effective assistance of counsel, because their attorneys had allegedly not advised them of their right to appeal from the judgments of conviction (see, for example, appellant Collins' Appendix, 3-4). On August 16, 1976, Judge Platt ordered a hearing to determine the issue of whether appellants' "right to appeal was frustrated by counsels' advice," and assigned counsel to represent appellants at the hearing (appellant Collins' Appendix, 15).

The hearing was held on October 8, 1976. Appellant Collins was the first witness. After waiving any attorney-client privilege which he had (T. 6),[2] Collins stated that at the time of his sentencing, he was represented by John Corbett, Esq., an attorney assigned under the Criminal Justice Act (T. 7). Collins testified that, prior to the entry of his guilty plea (on September 23, 1975), he had had no conversations with his attorney about an appeal. He further stated that at no time between September 23, 1975, and November 21, 1975, the day he was sentenced, did he discuss an appeal with his attorney (T. 9). Collins did recall a conversation with Mr. Corbett which, he said, occurred in the holding pen outside Judge Platt's courtroom, immediately after he was sentenced (T. 10). This conversation, testified Collins, was had in the presence of appellants Flammia and Peters, Flammia's former attorney, George Sheinberg, Esq., and "Councilman Mastropieri".[3]

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[2] References preceded by the letter "T" are to pages of the transcript of the proceedings before Judge Platt on October 8, 1976.

[3] Eugene Mastropieri, Esq., a New York City Councilman, was the attorney for a co-defendant, Rocco Mastrangelo, who elected to go to trial. See, *United States* v. *Mastrangelo*, et ano., Docket No. 75-1411, aff'd without opinion in open court, February 25, 1976 (T. 14-15).

Collins testified that he specifically requested Mr. Corbett to appeal the sentence. He said that his lawyer expressly told him that "due to plea bargaining" it was impossible for him to appeal (T. 12). Collins stated that the only other thing Mr. Corbett said was that another "route" to follow was a motion for modification or reduction in sentence under "Rule 35" (T. 12).

On cross-examination, appellant Collins insisted that, prior to the time of sentence, he had no idea that he might have a right to appeal the sentence. He stated, particularly, that within the two months immediately preceding the sentencing, he had never discussed the possibility of an appeal from the upcoming sentence (T. 19-20). Collins was then confronted with a letter, dated October 13, 1975, addressed to Messrs. Corbett and Sheinberg, and signed by himself and appellant Flammia (T. 21; appellant Collins' Appendix, 18). Collins admitted composing and typing the letter and giving it to Flammia for review before they mailed it to their former attorneys (T. 23-25). In pertinent part, the letter read as follows:

> "Just one more item, should the sentence be a, suspended and/or probation, all litigation will, cease, as I will not appeal the sentence nor request a modification of sentence pursuant to Rule 35 within the one hundred twenty days as prescribed by statute [sic]" (T. 25).

Collins attempted to explain this obvious contradiction to his sworn testimony by saying that the letter referred to procedures under *State* law, of which he was aware (T. 26). During the recross-examination of Collins it was conceded that the three 2255 motions were identical in all but nominal respects (T. 30-33).

John Corbett, Esq. was then called as a witness. He testified that he has been an attorney specializing in the

practice of criminal law for more than thirty years, and that he averages approximately twelve federal trials a year (T. 37-38). He recalled his representation of appellant Collins and specifically recalled representing him when he pled guilty and at the time of sentence (T. 38-39). Mr. Corbett acknowledged advising the appellant, prior to the plea, that he had no right to appeal from a guilty plea, but denied any further conversation about "appeal" at that time (T. 39-40).

Mr. Corbett noted that the next substantive conversation which he had with his client was after sentence was imposed, in the holding pen (T. 40-42). At that time, according to Mr. Corbett, there was some conversation but the topic of an appeal was never raised by anyone present (T. 44).[4] What they did discuss, related solely to a Rule 35 Motion (T. 44).[5] Corbett testified that at no time was he instructed or requested to file any appeal (T. 45).

Appellants Peters and Flammia also both testified. Peters described, in substantially the same way Collins had, the post-sentencing conversations in the holding pen (T. 53-54). He specifically stated that he had never instructed his lawyer Thomas J. O'Brien to file any appeals on his behalf, nor did he ever discuss the subject with him (T. 55-58). Appellant Flammia took the stand and gave his version of the post-sentencing meeting in the holding pen (T. 60). His version of the events was almost identical to that of Collins (T. 61-64). On cross-examination, Flammia acknowledged his signature on

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[4] Corbett's recollection of who was present was substantially consistent with Collins' testimony (T. 43; 45-46).

[5] Subsequently each appellant did file a Rule 35 motion; they were all denied (appellant Flammia's Brief 4; appellant Collins' Appendix, 4; appellant Peters' Brief, 4).

the October 13, 1975, letter and conceded that he was aware of its contents and adopted them when he signed it (T. 64-65). In response to a question by the court, Flammia admitted never even consulting with George Sheinberg on the question of an appeal (T. 65-66).

Finally, also testifying were Messrs. O'Brien and Sheinberg. O'Brien recalled the conversation in the holding pen after appellants were sentenced and the reference to a Rule 35 motion. He had no recollection, however, of any requests to file notices of appeal (49-51). Sheinberg's testimony corroborated that of co-counsels in every material respect (T. 67-75).

After hearing the testimony and observing the demeanor of the witnesses, the court denied appellants' petitions, making the following finding:

> "The Court fully recognizes the testimony of the three attorneys, Mr. Corbett, Mr. Scheinberg [sic] and Mr. O'Brien, and finds that there was no discussion of an appeal outside the pen following the sentences of the three defendants. There was a discussion of, apparently, as indicated by the three attorneys, of a motion for reduction under Rule 35. It also appears clear that the defendants, at least two of the defendants, Collins and Flammia, had in mind the fact that they might appeal because they wrote their counsel to such effect prior to the sentencing. Namely Mssrs. Flammia and Collins [sic] and the fact they didn't raise that question with them and press that question with them. Given those circumstances, I think this is of their own doing and not of their counsel. Under the circumstances, both your petitions are denied and the decision will stand. It is the judgment of the Court." (T. 83).

ARGUMENT

The District Court properly denied appellants' 2255 motions.

Rule 4(b) of the Federal Rules of Appellate Procedure provides that in a criminal case a notice of appeal by a defendant must be filed in the district court within 10 days after the entry of the judgment of conviction. It is not disputed that in this case Collins, Peters and Flammia each failed to file such a notice. The contention on appeal is that the ruling of the district court denying the 2255 motions should be reversed, because the failure to file the notices of appeal was, allegedly, the result of ignorance and incorrect advice of counsel. We respectfully submit that the record below shows that appellants' claims are without merit.[6]

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[6] Although they articulate the point in different ways, it is clear that the remedy which appellants are seeking is the right to prosecute untimely appeals from their original judgments of conviction. Appellant Collins asks for "an extension of the time allowed under [Rule 4(b)]." (Brief for appellant Collins, 4-5). Peters argues that his judgment of conviction should be vacated and that he should be allowed to file a notice of appeal (Brief for appellant Peters, 9). Appellant Flammia, meanwhile, urges this Court to vacate his sentence and to remand the case to the district court for resentencing so that he can "be afforded his right to appeal from that judgment of conviction." (Brief for appellant Flammia, 16).

Because of the peculiar nature of this appeal, appellants have not brought before the Court whatever contention they would have made had they timely appealed from their judgments of conviction. Although the original 2255 motion papers do refer to claims that the court used improper standards in sentencing (see, for example, appellant Collins' Appendix, 3), the issue was not addressed below and has not been presented to the Court for consideration on appeal.

At the outset, we note that under normal circumstances, the district court would not have the power to grant the relief which appellants were seeking, for Rule 4(b) clearly limits the extent to which the time to file a notice of appeal may be enlarged. Indeed, the rule very explicitly states that even upon a showing of excusable neglect, the district court may only "extend the time for filing a notice of appeal *for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.*" (emphasis added). Consequently, the trial court only has power, in the case of a criminal defendant, to extend the time for filing a notice of appeal to a date 40 days after the entry of the judgment of conviction. Here, appellants filed their motions more than three months after they were sentenced.

We fully recognize that an appeal in a criminal case is a matter of right, *Coppedge* v. *United States*, 369 U.S. 438 (1962), and that where a defendant has lost that right through the improper failure of his counsel to prosecute the appeal, appropriate relief will be granted. See, *Brewen* v. *United States*, 375 F.2d 285 (5th Cir. 1967). This case, however, hardly presents such a situation. Judge Platt found that the failure of appellants to file their notices of appeal was "of their own doing and not of their counsel." (T. 83). The record clearly supports that conclusion.

After hearing the evidence and observing the witnesses, the court chose to credit the testimony of appellants' former attorneys, Messrs. Corbett, Sheinberg and O'Brien. The lawyers all testified that although there was some discussion in the holding pen of Rule 35 motions, there were no requests made to file notices of appeal (T. 45, 48-51, 71). Moreover, the letter which Flammia and Collins wrote prior to sentencing clearly shows that

they were both fully aware of their appellate rights but that they chose not to pursue them, in favor of seeking Rule 35 relief. Similarly without merit are appellant Peters' contentions. At the hearing, Peters conceded that he had never discussed the possibility of an appeal with his attorney O'Brien, although he was present in the holding pen and, like Flammia and Collins, complained about his sentence (T. 55). Moreover, the court properly rejected Peters' claim that he failed to file a notice of appeal because he acted in reliance on incorrect advice concerning appellate rights which he allegedly overheard Corbett giving to Collins (T. 77-80). As Judge Platt pointed out, Corbett was Collins' attorney, not Peters'. Furthermore, as noted above, the court concluded, on the basis of the testimony at the hearing, that no such incorrect advice was given in the first place (T. 83).

In order to prevail on a claim of ineffective assistance of counsel, it is well-settled that a defendant must establish that his attorney's representation was so "woefully inadequate as to shock the conscience of the Court and made the proceedings a farce and a mockery of justice:" *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974) (and cases cited therein). Clearly there is no ineffective assistance of counsel where an attorney fails to pursue an appeal when his client did not instruct him to do so. Cf. *United States ex rel. Randazzo* v. *Follette*, 444 F.2d 625 (2d Cir.), *cert. denied*, 404 U.S. 916 (1971). The record in this case shows that appellants neither requested their lawyers to file notices of appeal nor discussed appeals with them. The district court correctly denied the 2255 motions.

CONCLUSION

The ruling of the district court should be affirmed in all respects.

Dated: January 7, 1977

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 714-018-AENY-034

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 10th day of January, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Raphael Scotto, Esq.	Stephen Flamhaft, Esq.	Mark A. Landsman, Esq.
300 Court Street	32 Court Street	66 Court Street
Brooklyn, N.Y. 11231	Brooklyn, N.Y. 11201	Brooklyn, N.Y. 11201

Evelyn Valenti

Sworn to before me this
10th day of Jan. 1977

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977